(F-162)

IN THE

Supreme Court of the United States

October Term, 1975

GRIFFIN, INC.,

Appellee,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY and JOHN WILLEY,

Appellants.

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Jurisdictional Statement for Appellants

Appellants appeal from a judgment and order of the United States District Court for the District of Vermont (statutory three-judge court) entered October 20, 1975, which denied appellants' motion to dismiss the case, on the grounds that the United States District Court should not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state; and which order temporarily enjoined the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment and hold further collection proceedings in abeyance pending a determination of the matter on the merits by the United States District Court.

Opinion Below

The opinion of the three-judge court dated October 20, 1975 is unreported and is reproduced as Appendix A to this statement.

Jurisdiction

The judgment of the three-judge court was entered on October 20, 1975. The notice of appeal was served on November 7, 1975 and is reproduced herein as Appendix B.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

This Court has jurisdiction because the two basic criteria for direct appeal from a three-judge United States District Court have been met: (1) Under 28 U.S.C. § 2281 the action appellee brought for a preliminary injunction was required to be heard and determined by a three-judge district court. In the complaint the appellee sought preliminary and permanent injunctions against the application of basic statewide taxing statutes. The appellee sought a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the United States Constitution. The appellee also sought permanent injunctive relief. (2) A preliminary injunction was granted after notice and hearing. Where a state statute is challenged, denial of a motion to dismiss for lack of subject matter jurisdiction and the granting of a preliminary injunction constitute the granting of an interlocutory injunction for the purposes of 28 U.S.C. § 1253. *Cf. Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972), in which the appellant sought a declaratory judgment and injunctive relief against the Household Finance Corporation on a promissory note and on the constitutionality of State garnishment laws. The Federal District Court dismissed the action for lack of

jurisdiction. The United States Supreme Court noted probable jurisdiction under 28 U.S.C. 1253.

The three-judge Court below held that an injunction should be granted and that the appellants' motion to dismiss for lack of subject matter jurisdiction made in reliance on 28 U.S.C. § 1341 should be denied on the grounds that the remedies available to the appellee under New York State statute and law were not plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Statute Involved

Title 28 U.S.C. § 1341:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Question Presented

Was the Court below in error when it determined that the two alternate methods of relief open to appellee for reviewing the applicability of the New York State Tax Law to its business provided for under New York Law, *i.e.*, *A.* Administrative and judicial review of the Tax Commission's decision as provided for by Article 78 of the New York Civil Practice Law and Rules and *B.* An action for a declaratory judgment in the courts of the State of New York, were not plain, speedy, or adequate remedies for the appellee within the meaning and intent of 28 U.S.C. § 1341?

The three-judge District Court below held that neither is plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Nature of the Case

The appellee is a Vermont corporation which has a place of business in Arlington, Vermont. It is engaged in the retail sale of furniture and gift shop items. A substantial portion of the appellee's sales are made to persons who are not residents of Vermont. Appellee's store is located approximately 25 miles from the Massachusetts-Vermont border and approximately 6 miles from the New York-Vermont border. A large portion of these interstate sales are to residents of New York State. The New York State sales tend to be concentrated in the Albany-Schenectady-Troy area which is fairly close to New York border, although sales are made on occasion to other parts of the State of New York.

Some of the articles purchased from the appellee by New York State residents are carried away from the store by the residents and some articles (particularly when furniture is involved) are delivered to New York in trucks owned by the appellee. Such deliveries are made by employees of the appellee and since the furniture sometimes requires assembling or setting up, such as the attachment of legs to a table, it makes it impractical to use common carriers to deliver furniture.

The appellee's advertising reaches into New York State. It advertises through advertising media located in the Albany-Schenectady-Troy area of New York and includes radio advertising, television advertising, newspaper advertising and a roadside sign located on a New York highway. The facilities for the radio and television stations are located entirely within New York State. Appellee's newspaper advertising is in a weekly joint television listing section of two newspapers which are published in Albany, New York and which are circulated primarily in the Albany-Schenectady-Troy area of New York.

The appellee also sends repairmen into New York State to service complaints. No charge is made for such repair service when it is done.

Based upon the contacts that the appellee has with New York State, the appellants, to determine if the appellee is a vender as defined by section 1101(b)(8)(.) of the Tax Law of the State of New York and to determine if the appellee is liable for the duties of a vendor as set forth in the provisions of section 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York (Appendix C) in regard to the collection and remittance of sales tax to the State of New York on those sales of tangible personal property delivered by it into New York State, sent a tax examiner to the appellee's place of business in Vermont to examine the appellee's books and records in order to determine if any sales tax was owed by the appellee to the State of New York. The examiner was denied access to the appellee's records and books.

On April 23, 1975, the appellants again went to the appellee's place of business to conduct an audit and appellee again refused to permit an audit and served the tax examiner with the complaint which commenced the present lawsuit.

The appellee brought an action in the United States District Court for the District of Vermont seeking a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process and Equal Protection clauses of the Constitution. The appellee also sought injunctive relief.

The appellants moved to dismiss on the grounds that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State" (28 U.S.C. § 1341).

A three-judge court was convened and a hearing was held on August 1, 1975.

The three-judge court by judgment and order dated October 20, 1975, denied the appellants' motion to dismiss and

granted the appellees a temporary injunction enjoining the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal by appellants is from that judgment and order and is pursuant to the provisions of 28 U.S.C. § 1253.

ARGUMENT

POINT I

Since the appellee has a plain, speedy and efficient remedy in the courts of the State of New York, the Court below erred in not dismissing the action for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341.

The appellee in its complaint sought to have the appellants enjoined in the enforcement and execution of various provisions of the New York State Tax Law.

However, Title 28 U.S.C. 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This restriction upon the power of the United States District courts in enjoining the enforcement of state tax laws has been interpreted on numerous occasions by this Court. In *Matthews* v. *Rogers*, 284 U.S. 521 (1932), this Court said:

> "The scrupulous regard for the rightful independence of state governments which should be at all times actuate the federal courts and a proper reluctance to interfere by injunction with the fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, the Court has uniformly

> held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the Courts, of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if a federal questions be involved."

In *Great Lakes Co.* v. *Huffman*, 319 U.S. 293 (1943) this Court held:

> ". . . it is the Court's *duty* to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." *Id.* at 300-301 (emphasis supplied).

Accordingly, although the District Court's exercise of discretion in actions seeking equitable relief is undeniably broad, this Court in *Great Lakes Co.* v. *Huffman, supra*, made it abundantly clear that "it is the Court's duty to withhold such relief" under the Johnson Act, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300. As the Court in *City of Houston* v. *Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir. 1965), cert. den. 382 U.S. 974 (1966) quite properly observed:

> "Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by that enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available." *Id.* at 199.

Accordingly, the propriety of the consideration of the Court below should have revolved around the question of whether or not the legal remedies afforded to the appellee by New York State are plain, speedy and adequate.

It is submitted that the legal remedies provided by New York State are plain, speedy and adequate.

The State of New York provides the appellee with two methods of relief. One is by way of—judicial review of the administrative agency and the other is by declaratory judgment.

A. Administrative Remedies

New York Tax Law, § 1138, provides for a state administrative review by the State Tax Commission. A hearing is provided before the State Tax Commission and judicial review of the determination of the State Tax Commission is specifically authorized by Tax Law, Article 28, by way of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Federal Courts have repeatedly found the available state tax remedies by way of Article 78 review to be adequate. See *Amer. Commuters Ass'n.* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y., 1967), affd. 405 F. 2d 1148 (2nd Cir., 1969); *Heckman* v. *Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising Service* v. *City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940). As the Court in *Collier* noted at 872:

> "Art. 78 * * * provides for review in the nature of the old time certiorari proceeding, for a stay *** for a raising of constitutional and jurisdictional questions *** [and] for restitution * * * "

It should be noted that the appellee in the present case has not only not exhausted its administrative remedies but it has not even begun its administrative remedies.

The appellee contended in the Court below that it should not have to use the administrative remedies available to it because the remedies are not plain, speedy or efficient. This conclusion is based on the argument that the appellee will have to post a bond or pay the assessment before it can commence a proceeding under Article 78 of the Civil Practice Law and Rules to review a decision of the New York State Tax Commission that it is subject to taxes.

The flaw in this reasoning is that the appellee is presupposing that it will not be successful at a formal hearing held before the New York State Tax Commission.

The New York State Tax Commission has the obligation to hold formal hearings and evaluate all of the evidence submitted at the hearing. Its determination must be based upon the evidence presented. The appellee will be given a hearing at which it may present any and all evidence to support its position that it is exempt from taxation by New York State. If it sustains its position that it is exempt from taxation by New York State, the New York State Tax Commission will grant it the exemption and thus end the entire proceeding. It is not required that the appellee pay the tax or post a bond prior to receiving a formal hearing. The whole matter could be resolved at no more expense than it would cost to appear at a hearing and produce evidence to support its position. The only time that the appellee must post a bond is if the New York State Tax Commission rendered a determination adverse to the appellee and the appellee commenced an Article 78 proceeding to review the determination of the State Tax Commission.

In the event that the appellee pays the tax and it is decided that it is exempt from taxation, the appellee's payment would be refunded with interest at the rate of six percent *per annum* upon such payment as is authorized by New York Tax Law § 1139(d). See *Matter of Brodsky* v. *Murphy*, 25 N Y 2d 518, 522 (1971).

It is submitted that the appellee has a plain, speedy and adequate remedy under the administrative-judicial review remedy provided by the laws of the State of New York.

B. Declaratory Judgment

(1)

New York Civil Practice Law and Rules, § 3001, provides for actions for declaratory judgment in the New York State Supreme Court in regard to the applicability or constitutionality of the Tax Laws of the State of New York. The courts of New York have held that "an action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provides that the method of judicial review presented therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case". *In the Matter of First National City Bank* v. *City of New York Finance Administration*, 36 N. Y. 2d 87 (1975); *Richfield Oil Corporation* v. *City of Syracuse*, 287 N.Y. 234, 239 (1942); see also *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N.Y. 198, 206 (1937); *Socony-Vacuum Oil Co.* v. *City of New York*, 247 App. Div. 163 (1st Dept., 1936), affd. 272 N.Y. 668 (1936); *Yonkers Raceway Inc.* v. *City of Yonkers*, 66 Misc. 2d 589, 593 (Sup. Ct., West. Co., 1971). These cases permitting declaratory judgment actions in cases of municipal taxation have been held applicable to state taxation as well. *Hudson Transit Lines, Inc.* v. *Bragalini*, 11 Misc. 2d 1094, 1096-7 (Sup. Ct., N.Y. Co., 1958); see also *Peters* v. *Tax Commission*, 18 A D 2d 880 (1st Dept., 1963), affd. 13 N.Y. 2d 1148 (1964).

The New York State Court of Appeals in the most recent case of *Slater* v. *Gallman, et al.* ..... N.Y. 2d ..... (decided November 20, 1975) held:

> "To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (*First Nat. Bank* v. *City of New York*, 36 NY2d 87, 92-93; *Richfield Oil Corp.* v. *City of Syracuse*, 287 NY 234, 239) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations (*Brown* v. *New York State Tax Comm.*, 199 Misc 349, 353-354, affd 279 App Div 837, affd 304 NY 651)."

In the recent case of *Hospital Television Systems, Inc.* v. *New York State Tax Commission*, 41 A D 2d 576 (3d Dept., 1973), affd. 36 N.Y. 2d 746, a case which challenged a decision of the State Tax Commission and which involved the question of the constitutionality of the application of section 1138 of the New York Tax Law (the same section of the Tax Law which the appellee contends is being unconstitutionally applied to it), the New York State Appellate Division, Third Department, said:

> "Section 1140 of such tax law states that the remedies provided by section 1138 are exclusive. It is well recognized that when a taxing authority jurisdiction is challenged on the ground that the statute is unconstitutional or inapplicable, resort need not be had to the method of review prescribed in the taxing statute (*Richfield Oil Corp.* v. *City of Syracuse* 287 N.Y. 234, 239.)"

The New York State Court of Appeals in the recent case of *First National City Bank* v. *City of New York*, 36 N.Y. 2d 87 (1975), said at page 92:

> "When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it (see *Richfield Oil Corp.* v. *City of Syracuse* 287 N.Y. 234, 239; *Dun & Bradstreet* v. *City of New York* 276 N.Y. 198, 206-207; *Secony-Vacuum Oil Co.* v. *City of New York* 247 App. Div. 163, 166-167, affd. 272 N.Y. 668)."

The Federal courts have also held that the action for declaratory judgment in the State of New York is a plain, adequate and speedy remedy.

In the recent case of *Ammex Warehouse Co., Inc., et al.* v. *Gallman, et al.* (unreported, N.D.N.Y. 72 Civ. 306; 72 Civ. 310), affd. 414 U.S. 802 (1973), in which the plaintiffs brought an action in the Federal Court to have New York State Tax Law, § 1138 declared unconstitutional as applied to plaintiffs, the three-judge court in a memorandum decision by Judge Kaufman held:

> "* * * we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that 'The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.' 28 U.S.C. §1341. We believe such a remedy is available in the New York courts. N.Y. Civil Practice Law and Rules §3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. *See, e.g.*, Richfield Oil Corp. v. City of Syracuse, 287 N.Y. 234 (1942); Hudson Transit Lines, Inc. v. Bragalini, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional.[6] The parties could seek ultimate review in the United States Supreme Court. 28 U.S.C. §1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. §1341."

For the Court's convenience, a copy of the district court's memorandum decision in the *Ammex* case, is attached as Appendix D to this statement. See also the case of *West*

Publishing Company v. *McColgan*, 138 F. 2d 320 (C.C.A. 9th Cir., 1943), where plaintiff who was not qualified to do business in California and who had no property in California, brought an action for declaratory judgment in the Federal court to declare California's corporation income tax void as denying due process of law and imposing a burden upon interstate commerce. The Federal court held that the action was not within the jurisdiction of the Federal District Court where the California law provided an adequate remedy in its State Courts.

(2)

Although the appellee has a right to a declaratory judgment in the courts of the State of New York, it inferred in the Court below that an action for a declaratory judgment in the State courts is not adequate because the appellee could not get injunctive relief pending the final determination by New York's highest court, the Court of Appeals.

Under the provisions of section 6301 and 6311 of the New York Civil Practice Law and Rules, the appellee could obtain a preliminary injunction against the appellants to enjoin the appellants from collecting taxes pending a determination of the case by the State courts where circumstances warrant.

Section 6301 of the New York Civil Practice Law and Rules reads as follows:

> "Grounds for preliminary injunction and temporary restraining order. A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

A preliminary injunction may be obtained against State officials as long as the officials are put on notice that the appellee is making a motion for a preliminary injunction or temporary restraining order (*cf. McArdle* v. *Comm. of Investigation*, 41 A D 2d 401 [3d Dept., 1973]).

It is therefore possible for the appellee to obtain the injunctive relief that it seeks in the courts of the State of New York.

The dual remedies of a declaratory judgment action and administrative agency review have been held to constitute an adequate review for purpose of invoking the dictates of the Johnson Act (28 U.S.C. 1341). *American Commuter Ass'n* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd 405 F. 2d 1148 (2d Cir. 1969); *Hickman* v. *Wujick*, 333 F. Supp. 1221 (E.D.N.Y. 1971); *Collier Advertising* v. *City of New York*, 32 F. Supp. 870 (S.D.N.Y. 1940). See also *Jones* v. *Township of North Bergen*, 331 F. Supp. 1281 (D.C.N.J. 1971); *Zenith Dredge Company* v. *Corning*, 231 F. Supp. 584, 588-589 (W.D. Wisc. 1964); *Gray* v. *Morgan*, 251 F. Supp. 316 (W.D. Wisc. 1966), aff'd 371 F. 2d 172 (7th Cir. 1966), cert. den. 386 U.S. 1033 (1967); *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), aff'd 373 U.S. 241 (1963); *Carson* v. *City of Fort Lauderdale*, 293 F. 2d 337 (5th Cir. 1961); *Aronoff* v. *Franchise Tax Board*, 348 F. 2d 9 (9th Cir. 1965); *City of Houston* v. *Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir. 1965), cert. den. 383 U.S. 974 (1966); *Bussie* v. *Long*, 254 F. Supp. 797 (E.D. La. 1966); *Carbonneau Industries, Inc.* v. *City of Grand Rapids*, 198 F. Supp. 627 (W.D. Mich. 1961.)*

It is clear that 28 U.S.C. § 1341 is applicable to the present case since the appellee has a plain, speedy and efficient

* Indeed several of these cited cases have held that one of the two remedies (available in New York) would suffice to fall within the confines of the Johnson Act requirement of adequate state remedies, *e.g. Abernathy* v. *Carpenter*, *supra*.

remedy before the New York State Tax Commission and in the New York State courts.

Since the appellee has a plain, speedy and efficient remedy in the courts of the State of New York and since the appellee has the same remedies available to it as it would have in the Federal courts in the absence of 28 U.S.C. § 1341, the Court below erred in not dismissing the complaint for lack of subject matter jurisdiction and it erred in granting the preliminary injunction to the appellee against the appellants.

It should be noted that the appellee, if there is an adverse decision in the courts of the State of New York, may petition this court to review any decision of the Court of Appeals of the State of New York which appellee feels wrongfully interpreted its constitutional rights with regard to the applicability of the New York State Tax Law to its business.

It is submitted that the Court below should have deferred the interpretation placed on a State Tax statute to the courts of the State of New York. *Cf. United Airlines* v. *Makin*, 410 U.S. 623, 629 (1973); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210 (1960); *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 337 (1944).

POINT II

The admitted activities of the appellee establish sufficient contacts with the State of New York to make the appellee amenable to suit in courts of the State of New York.

It is submitted that the Court below erred when it held that the appellee's contacts with New York were minimal.

For the sole purpose of expediting proceedings with respect to the appellants' motion to dismiss and the appellee's motion for a preliminary injunction a stipulation was entered into between the attorneys for the appellants and appellee. It was en-

tered into without prejudice to the right of either party to prove different or additional facts at later stages of the action.

In that stipulation, which is attached as Appendix E to this Statement the appellee, whose store is only six miles from the New York border, conceded that it does deliver merchandise into New York State in trucks owned by the appellee and that it sends repairmen into New York. The appellee therein admitted that it advertises on radio and television stations located in New York State and in newspapers published in New York. For the purposes of the stipulation, the appellee would not declare how often it delivers into New York State, or whether it was done on a regular basis. Nor would the appellee disclose a dollar amount of business that it delivers into New York State. Based on this alone, the Court below was in error in prejudging the merits of the case and without further proof find that the appellee's contacts with New York State were minimal.

It is submitted that the fact that the appellee delivers merchandise into New York State in its own trucks; sends repairmen into New York State to repair the merchandise; contracts with radio and television stations located wholly and solely within New York State to carry its advertising; and contracts with newspapers published solely in New York State to carry its advertising on a weekly basis (which advertising makes direct solicitation to New York residents by the fact that the map in the advertising specifically sets forth a map from the Albany, Troy, Cambridge areas of New York to the appellee's place of business in Vermont) (see Exhibit A of Appendix E), the appellee has sufficient contacts with New York State to make it amenable to sue and be sued in the courts of New York State.

It is these continuous and systematic activities of the appellee which give the appellee "presence" within the State of

New York. The appellee, by its activities in the State of New York, is engaging the benefits and protections of the laws of the State of New York. Indeed, if the check of a New York purchaser whose merchandise was delivered into New York State by the appellee was returned for insufficient funds, the appellee could come into the courts of New York State and bring an action to enforce its rights for the monies due and owing. Likewise, if the appellee is going to continue to conduct business in the State of New York, it must submit to the obligations which arise out of or are connected with its activities within the State. *International Shoe Co.* v. *Washington*, 326 U. S. 310. Such an obligation would be to collect a sales tax on those goods and merchandise which it delivers into the State of New York. It is submitted that the appellee's activities which establish the "presence" within the State of New York subject it to taxation by the State and to sue in the courts of New York to recover the tax if it feels that it should be exempted from the tax (cf., *International Shoe Co.* v. *Washington, supra).*

As Mr. Justice BLACK said in his concurring opinion in *International Shoe Co.* v. *Washington:*

> "Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313."

It is further submitted that the State of New York should not be deprived of the right to afford judicial protection to its citizens on the grounds that it would be more convenient for the appellee to sue or be sued somewhere else.

CONCLUSION

Appellants pray this Court to hear this appeal, that the order and judgment of the three-judge federal court below, which denied appellant's motion to dismiss for lack of jurisdiction should be reversed and the complaint dismissed.

Dated: November 24, 1975

Respectfully submitted,

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APPENDIX A

Opinion of United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT
For the District of Vermont

GRIFFIN, INC.

v.

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY and JOHN WILLEY

Civil Action
File No. 75-104

Before: Oakes, Circuit Judge and Holden and Coffrin, District Judges

Paul R. Wickes, Esq., Williams, Witten, Carter and Wickes, Bennington, Vermont for plaintiff.

Thomas P. Zolezzi, Esq., Assistant Attorney General, Albany, New York, and Peter Joslin, Esq., Theriault and Joslin, Montpelier, Vermont, for defendants.

COFFRIN, *District Judge.*

This case arises out of an attempt by various officials of the New York State Tax Commission and the Department of Taxation and Finance to require a Vermont corporation to collect New York Sales and Use Tax revenues.

A. *Background*

Plaintiff is a Vermont corporation which operates a retail furniture business in Arlington, Vermont, about six miles from the New York-Vermont border. A substantial amount of plaintiff's total sales are made to out-of-state customers, and of this interstate business a substantial portion involves New York residents.

On February 21, 1973, an associate sales tax examiner from the New York Sales Tax Bureau came to Griffin's store for the purpose of auditing plaintiff's books to establish a sales record which would then be the basis of an assessment of the New York sales and use taxes claimed to be owed by Griffin.[1] Plaintiff refused to allow an audit at that time. Matters rested there for more than two years, but on April 23, 1975, defendant Willey, a senior tax examiner, came to conduct an audit at the direction of defendants Tully, Koerner, and Manley who are members of the Tax Commission. Plaintiff again refused to allow an audit and served the complaint in this lawsuit at that time. Defendants subsequently issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" showing an amount of $218,085.37. The assessment was based on an estimate rather than any hard data concerning plaintiff's sales records. Subsequently, a second assessment in the amount of $298,580.59 was issued which superseded the original notice.[2]

Griffin seeks a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the Constitution. Plaintiff also seeks permanent injunctive relief. After receiving the complaint, defendants filed a motion to dismiss on the ground that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of

any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Plaintiff subsequently filed a motion for a preliminary injunction on May 30, 1975 and in its memorandum requested that a three-judge court be convened. This court was convened, and the motions to dismiss and for a preliminary injunction were argued on August 1, 1975.

B. *Preliminary Matters*

It is clear that except for the possible application of section 1341 we would have jurisdiction of this matter. The complaint raises substantial federal questions arising under the Commerce clause and the fourteenth amendment. *Hagans v. Lavine*, 415 U.S. 528 (1974). Plaintiff appears to have stated a claim based directly on the constitution and since there is more than $10,000 in controversy, we have jurisdiction under 28 U.S.C. § 1331(a). Additionally, 42 U.S.C. § 1983 provides a cause of action for deprivation of constitutional rights under color of state law and we also have jurisdiction under 28 U.S.C. § 1343(3).

A three-judge court is appropriate in this case because the complaint seeks to enjoin state officials from executing a state statute,[3] raises substantial constitutional questions,[4] and alleges a basis for injunctive relief.[5] *See Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 94 (1974). Only a three-judge court has the authority to issue even an interlocutory injunction. 28 U.S.C. § 2281. Although a single judge can entertain a motion to dismiss for lack of subject matter jurisdiction, *Id.* at 100, it is certainly permissible for a three-judge court to do so, *Ammex-Champlain Corp. v. Gallman*, Civil Nos. 72-306, 72-310 (N.D.N.Y. Mar. 13, 1973), *aff'd* 414 U.S. 802 (1973), particularly where consolidation of the motions for hearing may save judicial time and energy.

C. *Motion to Dismiss*

We turn first to defendants' motion to dismiss the complaint pursuant to 28 U.S.C. § 1341. Although by its terms section 1341 only forbids a district court to award injunctive relief, the policy considerations which underlie the statutory command preclude an award of declaratory relief as well. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Clearly, if we lack the ability to grant Griffin the relief it seeks, the case must be dismissed. In that event, it would be unnecessary to reach the merits of plaintiff's motion for a preliminary injunction.

In support of their motion to dismiss defendants argue that there are two available remedies. The first is an administrative appeal to the Tax Commissioners and from there to the New York courts as set forth in section 1138 of the Sales and Use Tax Law.[6] The other remedy is a declaratory judgment action under section 3001 of the New York Civil Practice Law and Rules (CPLR). We conclude, however, that neither is "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341.

1. *Administrative Appeal*

New York Sales and Use Tax Law section 1138 provides that a taxpayer may request an administrative review of the initial assessment in a proceeding before the Tax Commission. The Commission in turn may be reviewed by a CPLR article 78 proceeding. Article 78 review, however, requires that the taxpayer pay the tax or post a bond to stand for taxes, penalties and interest. Sales and Use Tax Law § 1138(a). This prerequisite to judicial review is a major hurdle in Griffin's case since plaintiff has been assessed a tax liability of $298,580.59, a figure it states is well beyond its ability to pay.

Defendants point out, however, that this figure is only an estimate which might be substantially reduced upon audit. At this juncture we have no way of knowing what figure an audit would disclose. However, even if an audit would result in a lower assessment, plaintiff objects to having to submit to such a procedure at the hands of a state which it claims has no jurisdiction to conduct an audit in any event.

In order to assert its rights or test its claim, Griffin should not be obliged as a condition precedent to make a choice between paying an assessment or posting a bond in an admittedly arbitrary amount or turning over its books and records to a state whose authority it claims is invalid. *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973). Whether New York has the authority to require Griffin to collect the New York Sales and Use Tax involves questions of constitutional law, but there is no indication that the Commission is competent to determine constitutional issues.[7] The Tax Commission redetermines the tax after an initial assessment has been challenged. The redetermination then can be reviewed "for error, illegality or unconstitutionality or any other reason whatsoever . . ." by an article 78 proceeding. Sales and Use Tax Law § 1138(a). Since Griffin does not have to submit to an audit prior to having its constitutional claim heard and since the Tax Commission may be limited to reviewing the computation of tax without competence to resolve constitutional questions, plaintiff and defendants have reached an impasse.

Under the procedures laid down by section 1138 Griffin's first opportunity to air its constitutional claims may well be in an article 78 proceeding, but it is not clear that such judicial review would be available to plaintiff if it steadfastly refuses to submit to audit. Presumably, a hearing before the Tax Commission is a prerequisite to an article 78 proceeding, but

if plaintiff refuses to submit to Tax Commission authority, then it may jeopardize its article 78 appeal rights. Under these circumstances refusing to allow inspection of books and records might be likened to a failure to exhaust administrative procedures prior to the right to appeal.

In addition to doubts concerning the adequacy of article 78 review, there is one practical consideration of the utmost significance. Even if judicial review is technically available for all issues, Griffin may be unable to present its arguments because of the prepayment or bond requirement. It is fair to assume that the initial assessment of $298,580.59 would remain unchanged since the Commission would be unable to revise or verify the preliminary estimate without examining Griffin's books and records. Since it is clear that Griffin is unable either to pay the present assessment or to post bond in that amount, the issue is whether the requirement that plaintiff post bond or prepay the tax plus penalties and interest is a condition which renders an article 78 proceeding inadequate for purposes of section 1341. The general rule is that a state may require a taxpayer to litigate from a refund posture even when he questions the validity of the tax itself. *Great Lakes Dredge & Dock Co.* v. *Huffman, supra* at 301. This remedy may be harsh, but there is no indication that it violates due process. *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754, 761 (3d Cir. 1973), *aff'd* 419 U.S. 345 (1974). But in some instances the assessment poses such a heavy burden that to deny equitable relief is to deny judicial review entirely. *Denton* v. *City of Carrollton*, 235 F.2d 481, 485 (5th Cir. 1956). In such instances a federal court may award equitable relief.

Extraordinary circumstances are present in this case which bring Griffin within the exception to the general rule. New York officials have admitted that the assessment represents an estimate of a liability which is itself contingent on whether the

tax may be constitutionally applied. Even if it is liable for some tax, plaintiff claims that this estimate is grossly inflated. Plaintiff should not have to prepay or post bond in an entirely arbitrary amount that may bear little relationship to any eventual liability. Second, the bond or prepayment requirement is a prohibitive barrier to an article 78 hearing because Griffin cannot raise the necessary funds by borrowing or otherwise. A bond is not available except at a premium nearly equal to its face value or unless fully supported by collateral. (Affidavits of Robert Dimke, John Lonergan). Finally, an assessment of this magnitude is clearly coercive in its effect. Griffin must carry the assessment on its books as a contingent liability which will severely hamper it in obtaining the credit it needs in the ordinary course of business. (Affidavits of Robert Dimke, Arthur Wickenden). If Griffin cannot carry on its affairs with this assessment outstanding, it must accede to the desires of the New York State officials or face the dire consequences customarily attendant upon a business which cannot meet its credit requirements.

In short, we have no assurance that New York courts would even entertain a suit seeking review of a final determination of tax liability where the taxpayer refused to submit to the Tax Commission's authority. Furthermore, the prepayment or bond requirement in effect denies article 78 review in this instance. Consequently, we are of the opinion that the administrative review procedure does not afford a "plain, speedy or efficient remedy."

2. *Declaratory Judgment*

Defendants claim that New York's CPLR § 3001 provides for a declaratory judgment remedy. They argue that Griffin could present its constitutional claims without having to submit to an audit, prepay the assessed tax, or post bond in that

amount. There are several difficulties with this remedy, however, which lead us to conclude that it does not satisfy section 1341.

Section 1140 of the Sales and Use Tax Law provides:

> § 1140. REMEDIES EXCLUSIVE.—The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be *exclusive remedies* available to any person for the review of tax liability imposed by this article; and *no determination* or *proposed determination* of tax or determination on any application for refund shall be *enjoined* or *reviewed* by *an action for declaratory judgment*, an action for money had and received, *or by any action or proceeding other than a proceeding under article seventy-eight* of the civil practice law and rules. (Emphasis added).

While the language of section 1140 apparently forecloses any declaratory judgment remedy, defendants claim that the case law has substantially diffused the effect of this forceful statement. New York courts have held that a declaratory judgment action may be maintained despite statutory language making a review proceeding exclusive if the taxpayer challenges the tax as unconstitutional or inapplicable to his case. *Richfield Oil Corp.* v. *City of Syracuse*, 287 N.Y. 234, 239 (1942). The general rule stated in *Richfield* has been applied specifically to section 1140 by a lower appellate court. *Hospital Television Systems, Inc.* v. *New York State Tax Commission*, 41 A.D.2d 576 (3d Dept. 1973). In addition, some federal cases have assumed that a declaratory judgment remedy was available in dismissing taxpayer actions for injunctive relief on the grounds that an adequate state remedy existed. *Hickmann* v. *Wujick*, 488 F.2d 875, 876 (2d Cir. 1973); *Ammex-Champlain Corp.* v. *Gallman*, *supra*. Nevertheless there appears to be a contradiction between the plain

language of section 1140 and the few cases we have found which cloaks this issue in some uncertainty.

When there is uncertainty with regard to the adequacy of a state remedy, a federal court may retain jurisdiction and give appropriate relief. *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105-106 (1944). Clearly, if a remedy is entirely unavailable, it would be inadequate. Since it is not certain that a declaratory judgment is available in this instance, we cannot be sure that the remedy in question is adequate.

But even if it were certain that section 3001 is available, a declaratory remedy standing alone may still be inadequate. *Spector Motor Co.* v. *McLaughlin*, *supra*.[8] In *Ammex* the court ruled that the apparent inability of New York courts to give injunctive relief was not crucial, but there are important distinctions between *Ammex* and this case which lead us to the opposite conclusion. Ammex-Champlain sold cigarettes and liquor to travelers going from the United States to Canada. The corporation maintained sales offices and warehouses at various points on the New York side of the border. The warehouses were located so that one could only go into Canada after picking up one's merchandise. This unique physical arrangement gave rise to a claim that the sales were exempt from state tax under both the Commerce and Export-Import clauses of the Constitution. The important point is that the corporation was clearly present in New York State, and therefore it could expect to litigate in New York courts. But Griffin's contacts with New York are minimal.[9] For this reason it seems unfair to make Griffin litigate in an unfamiliar forum.[10] Plaintiff's unfamiliarity with New York courts is a counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state. This counterweight admonishes us to exact a somewhat higher degree of certainty regarding the adequacy

of New York's declaratory judgment remedy than was appropriate in *Amnex*. But though a higher standard of certainty should obtain, we do not have the same basis for confidence regarding the availability of preliminary relief should the need arise. In *Amnex* the parties agreed that there would be no collection attempt pending a New York court's decision on the merits, but there is no such stipulation in this case. Defendants argue that preliminary injunctive relief would be available in New York courts, but we have reservations on this score as seemingly did the court in *Amnex*.

Accordingly, we hold that in the circumstances of this case New York's declaratory judgment remedy is neither so certainly available nor so clearly adequate as to preclude our jurisdiction to issue injunctive relief. Since neither of the remedies available to plaintiff in New York are "plain, speedy and efficient," we have the power to grant injunctive relief and this lawsuit need not be dismissed.

D. *Motion for Preliminary Injunction*

We turn now to Griffin's motion for a preliminary injunction. In deciding whether to grant or deny preliminary relief the two primary considerations are plaintiff's chance of eventual success on the merits and the potential for irreparable injury if interlocutory relief is not granted. It is also important to balance the potential hardship to both plaintiff and defendants and to ascertain where the public interest lies. *New York Pathological and X-Ray Laboratories, Inc.* v. *Immigration and Naturalization Service*, Doc. No. 74-2630, at 5668-69 (2d Cir. Aug. 18, 1975).

1. *Irreparable Injury*

Griffin may well suffer irreparable injury from New York collection attempts once the assessment becomes final. Griffin is vulnerable because it makes deliveries to New York purchasers in its own trucks. If plaintiff continues this practice the trucks and merchandise could be seized.[11] Seizures would disrupt business, frustrate customers, and result in loss of sales. Griffin's alternative would be to completely change its present mode of operation. New York may also attempt collection in Vermont by lawsuit and liens on property. In short, vigorous collection attempts could cripple and perhaps destroy Griffin's business.

Another potential injury stems from the fact that Griffin will be unable to contest the amount of its liability should we ultimately decide that New York does have the authority to require plaintiff to collect the tax. Griffin claims the current assessment is excessive, but section 1138 requires that anyone wishing to challenge an assessment must request a hearing before the Tax Commission within 90 days of notice. The assessment was issued on August 8, 1975. Unless the 90 day period is tolled, the time for requesting a hearing almost assuredly will have passed before we reach a decision on the merits.

Finally, the assessment will appear as a black mark on Griffin's balance sheet. Griffin must carry the assessment as a contingent liability which will substantially impair plaintiff's ability to secure the credit it needs in the ordinary course of business.

Griffin clearly needs preliminary relief to prevent it from suffering irreparable injury, and defendants will not be harmed by some delay. Although the court takes judicial notice of the fact that some state and municipal governments are currently hard-pressed to meet their financial obligations, collection of this assessment will not make the difference between financial stability and ruin.[12] On balance, Griffin deserves protection if it can show a likelihood of success on the merits.

2. *Probability of Success on The Merits*

New York seeks to hold a Vermont corporation responsible for the collection of New York's sales and use tax on furniture sales to New York residents. In *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954), Justice Jackson discussed a similar taxing scheme set up by the State of Maryland. The economic effect of holding Griffin liable for collection of the sales and use tax is to protect New York businesses by putting out-of-state retailers on the same footing as local merchants for sales to New York residents. But as distinguished from a direct tax on a sale, liability here arises only on the importation of the furniture into New York, an event which occurs after title has passed and of which Griffin may have no knowledge. Since the sale in Vermont establishes no link between Griffin and New York, the issue is whether Griffin's acts or course of dealing has subjected it to New York's taxing authority or has afforded New York jurisdiction to saddle Griffin with responsibility for tax collection. Due process requires some minimum link between a state and the person, property, or transaction it seeks to tax.

Miller Bros. involved a situation almost identical to the one before us now. A Delaware furniture corporation operating in Wilmington made sales to Maryland residents. Customers sometimes took their purchases with them, but usually Miller Bros. delivered the items in its own trucks or by common carrier. The only difference of any colorable significance between Griffin's operation and those of the Delaware firm is that Miller Bros. advertised only in Wilmington newspapers, radio, and television while Griffin uses media based in the Albany-Schenectady-Troy region of New York. This difference is not important, however, since residents of Bennington County, Vermont, Griffin's primary marketing area, rely on New York media. Miller Bros. advertising reached

Maryland and Delaware residents alike just as Griffin's reaches residents of New York and Vermont. The site of a broadcasting tower or a printing press should not be controlling. Neither Miller Bros. nor Griffin made a special appeal to out-of-state residents.

Because of the similarities, the Supreme Court's decision in *Miller Bros.* holding that Maryland had exceeded its authority is extremely persuasive precedent. Other cases which uphold a state's taxing power are distinguishable on their facts. In *General Trading Co. v. Tax Commission*, 322 U.S. 335 (1944), a corporation based in Minnesota sent traveling salesmen into Iowa to solicit orders for merchandise which the home office then sent to Iowa by common carrier or mail. Similarly, in *Scripto v. Carson*, 362 U.S. 207 (1960), a division of Scripto based in Atlanta solicited orders in Florida by using Florida residents as jobbers. Scripto assigned jobbers a specific territory and paid them on a commission basis. In *Miller Bros.* Justice Jackson distinguished *General Trading* on the ground that the subject corporation sent its sales representatives into the taxing state, a distinction we are inclined to follow in the case at hand.

Since Griffin has demonstrated a likelihood of success on the merits and on balance a need for interlocutory relief, a preliminary injunction will issue.

Accordingly, defendants' motion to dismiss is denied. Plaintiff's motion for a preliminary injunction is hereby granted. Defendants are temporarily enjoined from attempting to collect the tax assessed against plaintiff. Defendants are ordered to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in

abeyance pending a determination of this matter on the merits.

JAMES L. OAKES,
United States Circuit Judge.

JAMES S. HOLDEN,
United States District Judge.

ALBERT W. COFFRIN,
United States District Judge.

October 20th, 1975.

FOOTNOTES

[1] Defendants maintain that by reason of plaintiff's activities in New York State the plaintiff is a vendor as defined by section 1101(b)(8)(i) of the Tax Law. As such defendants claim Griffin is required to register, collect and remit sales taxes on sales of tangible personal property delivered in New York State, is personally liable for sales taxes not collected and remitted and must permit examination of its records. The duties of a vendor are found in sections 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York. For purposes of this opinion and order it is only necessary to note that defendants seek to impose collection of the New York Sales and Use Tax on plaintiff, a Vermont corporation, and plaintiff seeks to resist that effort. Accordingly, it is unnecessary to set forth the appropriate provisions of the statute in detail.

[2] The original notice was issued on May 14, 1975. Under section 1138(a) of the Sales and Use Tax Law, a party has 90 days to apply to the Tax Commission for a hearing on the assessment. This period would have run out on August 11, 1975, however, the Commission cancelled the May 14, 1975 notice and issued a superseding notice on August 8, 1975. The new notice shows an assessment of $298,580.59. Thus plaintiff has not as yet lost his right to appeal to the Tax Commission, but the new assessment is larger by approximately $80,000.00.

[3] *Moody v. Flowers*, 387 U.S. 97 (1967).

[4] *Gonsby v. Osser*, 409 U.S. 512 (1973).

[5] *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

[6] § 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accomodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereof, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivison (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

[7] Defendant argues that the Commission is competent to decide questions as to its own authority, but they have not cited any authority for this proposition.

[8] Declaratory relief was available in *Spector*; nevertheless the Supreme Court held that a federal court should retain jurisdiction of the suit in order to give appropriate equitable relief. A complicating factor in *Spector*, however, was the fact that there were undecided questions of state tax law which potentially could have disposed of the case in plaintiff's favor without reaching the constitutional claims. Since there was a declaratory judgment remedy where those questions could be decided, the Supreme Court instructed the district court to abstain while the parties litigated these matters in state court. Abstention would be improper in this case, however, because there is no indication that there are undecided questions under New York's tax law, and furthermore, the declaratory judgment remedy is not completely certain. Township of *Hillsborough v. Cromwell*, 326 U.S. 620, 629 (1946).

[9] Plaintiff owns no realty and has no place of business in New York. It does not solicit business in New York through any sort of representative. Plaintiff does advertise in the media which serve the Albany-Schenectady-Troy region. This is the only metropolitan area within plaintiff's marketing area. Vermont based media do not cover all of plaintiff's Vermont marketing area so Griffin relies in part on New York newspapers, television channels, and radio stations whose coverage includes southwestern Vermont. In addition to advertising in New York media, Griffin also delivers merchandise to New York buyers in plaintiff's own trucks or occasionally by common carrier. Upon delivery, plaintiff's employees may assemble pieces of furniture. Occasionally employees return to "touch up" or repair minor defects. No charge is made for such services.

[10] Plaintiff, a Vermont corporation, has never been and is not now registered or qualified or authorized to do business in New York State. We need not decide whether, despite this fact, it has sufficient contacts with the State of New York to subject its person to the jurisdictional power of the New York courts. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). But it is clear that in order to avail itself of either the section 1138—article 78 proceeding or section 3001 declaratory judgment remedy Griffin would have to submit itself to the jurisdiction of the New York courts and thereby deprive itself of any possibility of asserting a claim that it was not subject to such jurisdiction. It should not be forced to litigate in New York at the risk of losing the opportunity to raise this issue. A remedy can hardly be said to be "plain, speedy and efficient" if the only way a party can take advantage thereof is to abandon a valid right which it possesses.

[11] Exhibit D(2) to plaintiff's motion for a preliminary injunction is a news release forwarded to plaintiff by defendant Maloney. The news release concerns roadblocks which were set at three bridges leading from New Jersey to Staten Island to discover shipments of household appliances, furniture and other merchandise trucked into New York from New Jersey by merchants who had not collected the New York sales tax. Although the news release does not indicate that any seizures occurred, it would appear that a roadblock could lead to a seizure.

[12] In fact, upon oral argument counsel for the defendants indicated that the assessment against Griffin was brought about largely, if not entirely, as the result of New York competitors' complaints to the Tax Department.

APPENDIX B

Notice of Appeal by State of New York

UNITED STATES DISTRICT COURT

For the District of Vermont
Civil Action File No. 75-104

GRIFFIN, INC.,

Plaintiff,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY and JOHN WILLEY,

Defendants.

Sirs:

PLEASE TAKE NOTICE that the defendants hereby appeal to the United States Supreme Court from the judgment and order of this Court entered October 20, 1975 in its entirety which denied defendants' motion to dismiss the action for lack of subject matter jurisdiction; and which temporarily enjoined the defendants from attempting to collect the tax assessed against the plaintiff and ordered the defendants to revoke the notice of assessment dated August 8, 1975, and

hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, November 7, 1975.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants,
Office and P. O. Address,
The Capitol,
Albany, New York 12224,
Tel. No. (518) 474-1394.

By THOMAS P. ZOLEZZI,
Thomas P. Zolezzi,
Assistant Attorney General.

To:

Hon. Edward J. Trudell,
Clerk of the Court,
United States District Court,
For District of Vermont,
Federal Building,
P. O. Box 945,
Burlington, Vermont 05401.

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87 Main Street,
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Vermont Local Counsel for Defendants.

APPENDIX C

New York State Tax Law, sections 1101(b)(8)(i), 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135.

APPENDIX A

"§ 1101. Definitions

* * *

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor. (i) The term 'vendor' includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be

authorized by the tax commission to collect such tax by part IV of this article;

(E) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons."

"§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail store of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public, and except any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining, and except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, and except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than with respect to articles purchased for the original equipping of a new ship); provided, however, that nothing contained in this paragraph shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service."

"§ 1131. Definitions

When used in this part IV,

(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

"§ 1132. Collection of tax from customer; proof required for registration of motor vehicles

(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price,

amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state."

"§ 1133. Liability for the tax

(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax."

"§ 1134. Registration

On or before August first, nineteen hundred sixty-five, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person required to collect any tax imposed by this article and every person purchasing tangible personal property for resale shall file with the tax commission a certificate of registration in a form prescribed by it. In addition to those persons required to register pursuant to the preceding sentence, on or before June first, nineteen hundred sixty-six, or in the case of persons commencing business or opening new places of business after such

date, within three days after such commencement or opening, every person selling tangible personal property for resale shall also file such a certificate. The tax commission shall within five days after such registration issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the registrant. A registrant who has no regular place of doing business shall attach such certificate to his cart, stand, truck or other merchandising device. Such certificates shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named. However, a person who is presently registered pursuant to the provisions of title G, M, N or V of chapter forty-six of the administrative code of the city of New York or under any retail sales, compensating use, consumer's utility, admissions and dues or hotel room occupancy tax imposed by a city, county or school district pursuant to the provisions of chapter two hundred seventy-eight of the laws of nineteen hundred forty-seven, as amended, need not register again under this article unless the tax commission shall require him to do so. A person other than one described in clauses (A), (B) and (C) of paragraph (8), of subdivision (b), of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article."

"§ 1135. Records to be kept

Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately. Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer."

"§ 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to

the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission and undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy

assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

APPENDIX D

Decision of United States District Court for the Northern District of New York

UNITED STATES DISTRICT COURT

Northern District of New York

AMMEX-CHAMPLAIN CORP.,

Plaintiff,

-against-

NORMAN GALLMAN, MILTON KOERNER and A. BRUCE MANLEY as President and Members of the State Tax Commission of the State of New York,

Defendants.

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72 Civ. 306

AMMEX WAREHOUSE COMPANY, INC.,

Plaintiff,

-against-

NORMAN GALLMAN, MILTON KOERNER and A. BRUCE MANLEY as President and Members of the State Tax Commission of the State of New York,

Defendants.

---

72 Civ. 310

KAUFMAN, *Circuit Judge*:

Ammex Warehouse Co. and Ammex-Champlain Corp. are engaged in the business of selling cigarettes and liquor at

eight locations[1] to persons entering Canada from New York. Although minor variations occur at each facility, the general scheme of operations may be described as follows. At each location, Ammex has two buildings. One building is a sales office, where sample merchandise is displayed. Persons who are about to cross the border into Canada enter this building and choose and pay for their purchases. No merchandise is delivered at this point. Instead, the customer receives an invoice recording his purchases.[2] He then proceeds to a warehouse, which is located immediately adjacent to the border, where he presents his invoice to an employee of Ammex, who places the merchandise in the customer's vehicle under the supervision of a United States Bureau of Customs Inspector. The warehouse facilities are designed in such a way that a customer can proceed only across the border after he receives his purchases and nowhere else.[3] A Customs Inspector observes each customer cross the border and certifies on a copy of the invoice that the merchandise has been exported.

Ammex's operations are governed by the Tariff Act of 1930, 19 U.S.C. §1311 *et seq.*, and the alcoholic beverage and tobacco products provisions of the Internal Revenue Code of 1954, 26 U.S.C. §5001 *et seq.* Pursuant to these statutes, alcoholic beverages and tobacco products which are exported from the United States are exempted from Federal excise taxes and duties. The Bureau of Customs closely supervises Ammex's facilities to insure that all tax-free merchandise actually is exported and that none enters the domestic market. Bureau of Customs personnel are present at Ammex's facilities and, in addition to observing the delivery and export of all merchandise, maintain detailed inventory controls.

The present controversy began in 1971 when, for the first time since Ammex commenced operations in 1963, the New York State Tax Commission, whose three members are the defendants in these cases, assessed state alcoholic beverage, tobacco, and sales taxes—totalling approximately in excess of $1,829,704.58 against Ammex. See Arts. 18, 20, and 28, N.Y. Tax Law (McKinney's 1966). Ammex, claiming that its operations were exempt from state taxation under both the Commerce Clause[4] and the Import-Export Clause[5] of the United States Constitution, brought these actions in federal court seeking a declaratory judgment that application of the New York taxing statutes to Ammex's export operations was unconstitutional and an injunction preventing any further assessments or collection of the tax. Since the complaints sought a "permanent injunction restraining the enforcement, operation or execution of [a] State statute by restraining the action of [an] officer of such State," a three-judge district court was convened pursuant to 28 U.S.C. §2281.

Although Ammex's challenge to the New York taxes, at first blush, appears meritorious, *see* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (departing airline passengers ordered liquor at a United States airport and received merchandise upon debarking in a foreign country; held not subject to state licensing requirements); Ammex Warehouse Company of San Ysidro v. Dep't of Alcoholic Beverage Control for the State of California, 224 F. Supp. 546 (S.D. Cal. 1963) (three-judge district court) (operation at California-Mexico border similar to Ammex's New York operations held not subject to state licensing requirements), *aff'd*, 378 U.S. 124 (1964) (*per curiam*, citing to *Hostetter*, *supra*), we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state" 28 U.S.C. §1341. We believe such a

remedy is available in the New York courts. N.Y. Civil Practice Law and Rules §3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. *See, e.g.*, Richfield Oil Corp. v. City of Syracuse, 287 N.Y. 234 (1942); Hudson Transit Lines, Inc. v. Bragalini, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional.[6] The parties could seek ultimate review in the United States Supreme Court 28 U.S.C. §1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. §1341. We doubt that the State Tax Commission, after stressing to this court the adequacy of a declaratory judgment action, would attempt to collect any assessed taxes during the pendency of such an action brought by Ammex. Moreover, the State has stipulated before us that no attempt to collect any such taxes will be made until after the final resolution of plaintiffs' declaratory judgment action in the state courts. Accordingly, the present absence of any indication that available state remedies are inadequate requires us to dismiss Ammex's actions for lack of jurisdiction. Of course, Ammex is free to return to federal court if a declaratory judgment action proves inadequate.

So ordered.

IRVING R. KAUFMAN,
U.S.C.J.
JAMES T. FOLEY,
U.S.D.J.
EDWARD PORT,
U.S.D.J.

Dated: Albany, New York, March 15, 1973.

Appendix D.

FOOTNOTES.

[1] Ammex Warehouse Co. maintains sales facilities at Buffalo, Niagara Falls, Wellesley Island, Messina, Ogdensburg, Trout River, and Rouses Point. Ammex-Champlain Corp. operates at a single location in Champlain. For convenience, both companies will be referred to collectively as "Ammex."

[2] Prominently printed upon the invoice are the words "Articles are sold for EXPORT ONLY. Purchases brought back to the United States must be declared and are subject to duty and/or tax." A sign with identical language is posted in the office.

[3] For example, at Champlain, the warehouse area is enclosed within a fence. After leaving the warehouse delivery platform, a customer drives on a one-way road which leads to a gate located at the border. Customers are not permitted to turn around on the road; once merchandise is received, they must leave the warehouse area through the gate and enter Canada.

[4] Art. I, §8, Cl. 3: "The Congress shall have Power. . .To regulate Commerce with foreign Nations, and among the several states . . . ."

[5] Art. 1, § 10, Cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ."

[6] Thus, we need not decide whether an alternate state remedy—judicial review under Art. 78, N.Y. Civil Practice Law and Rules (McKinney's 1970), of an administrative proceeding challenging the tax before the State Tax Commission—is "plain, speedy and efficient." A taxpayer must either pay the assessment or post a bond of equivalent value in order to obtain such review. Moreover, no interest would be paid on cigarette and alcoholic beverage taxes subsequently held to have been assessed illegally.

APPENDIX E

Stipulation Between Attorneys for Parties

UNITED STATES DISTRICT COURT

For the District of Vermont

GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLY, JR., *et al.*,

Defendants.

Civil Action, File No. 75-104

COME NOW the parties hereto, and, by their undersigned attorneys, stipulate as to the following facts. The parties agree that this stipulation is entered into for the purpose of expediting proceedings with respect to defendants' motion to dismiss and plaintiff's motion for a preliminary injunction, and this stipulation is entered into without prejudice to the right of either party to prove different or additional facts at later stages of this proceeding.

I. Background Facts

1. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin, Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington, Vermont since approximately 1947.

2. Plaintiff store is located approximately 25 miles from the Massachusetts-Vermont border, and approximately 6 miles from the New York-Vermont border.

3. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont. A substantial portion of such interstate sales are to residents of New York.

4. Articles purchased from plaintiff are sometimes carried away from the store by purchasers, and especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by plaintiff.

5. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

6. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York State and local sales and use taxes owed by plaintiff. Plaintiff refused to permit Mr. Bradford to conduct an audit.

7. On April 23, 1975, defendant Willey came to plaintiff's place of business for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability under New York's Sales and Use Tax Law. Plaintiff refused to permit such an audit.

8. The action of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York state and local sales and use taxes against plaintiff, was taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

9. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of $218,085.37.

10. The Notice referred to in Paragraph 9 hereof is based on an estimate.

11. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York State Sales and Use Tax Law. Under New York law, Plaintiff will lose whatever rights it may have to appeal this notice to the New York State Tax Commission on or about August 11, 1975.

II. Contacts of Plaintiff With New York State

A. In General

1. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

2. Plaintiff has never owned any real property in New York State.

3. Plaintiff does not solicit sales in New York State through salesmen, agents, or other representatives.

4. Plaintiff has no office, warehouse, showroom, or other facility of any kind in New York State.

B. Deliveries

1. Furniture purchased by residents of New York State from plaintiff is typically delivered to the purchaser in trucks owned by plaintiff, or occasionally by common carrier.

2. Such deliveries are made by employees of plaintiff. Furniture sometimes requires assembling or "setting-up", such as the attachment of legs to a table. This generally makes it impractical to use common carriers to deliver furniture.

C. Repairs

1. Employees of plaintiff enter New York State infrequently for the purpose of repairing furniture purchased from plaintiff.

2. A typical such repair would be the "touching-up" of scratches on wooden furniture.

3. No charge is made for such repair services.

D. Advertising

1. Plaintiff advertises through advertising media located in the Albany-Schenectady-Troy area of New York, and in Vermont.

2. Such advertising includes primarily radio advertising, newspaper advertising, occasional television advertising, and one roadside sign located near the Vermont border on New York Route 7.

3. The Albany-Schenectady-Troy area of New York is the only substantial metropolitan area located within plaintiff's primary marketing area.

4. WBTN, of Bennington, Vermont, is the only commercial radio station located in Bennington, Vermont. WBTN

cannot be heard using ordinary radio receivers in large parts of Bennington County. Plaintiff advertises on WBTN.

5. WCAX, located in Burlington, Vermont, is the only commercial television station located in the state of Vermont.

6. WCAX-TV can, with few exceptions, be received in Bennington County only by cable. Cable service carrying WCAX-TV has only recently become available in Bennington, Vermont. Plaintiff does not advertise on WCAX-TV.

7. Bennington County, Vermont relies primarily on the Albany-Schenectady-Troy area of New York for radio and television broadcast media. For example, the three primary television stations which are received without cable in Bennington County, Vermont are WTEN (CBS), WRGB (NBC), and WAST (ABC), all located in the Albany-Schenectady-Troy area.

8. Plaintiff advertises on certain radio stations (and, in the past, has advertised on certain television stations) whose facilities are located entirely within New York State, and whose broadcast area includes southwestern Vermont.

9. Plaintiff advertises in the weekly joint television listings section of The Times-Union and The Knickerbocker News/Union-Star. These Newspapers are published in Albany, New York and circulated primarily in the Albany-Schenectady-Troy area of New York and in southwestern, Vermont. A copy of the advertisement published in the listings for June 7-14, 1975 is attached hereto as Exhibit "A."

Appendix E.

E. Credit and Collection

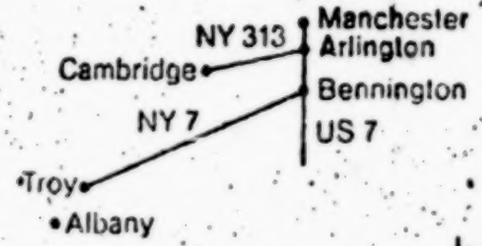
1. Plaintiff sells furniture exclusively for cash, check, or bank credit cards, and does not itself extend credit to customers.

Dated this 7th day of July, 1975.

GRIFFIN, INC.,
By Williams, Witten, Carter
& Wickes,
Its Attorneys,
By R. Paul Wickes,
A member of the firm.

JAMES H. TULLEY, JR., *ET AL.*,
By Louis J. Lefkowitz, Attorney General
of the State of New York,
Attorney for Defendants,
By Thomas P. Zolezzi,
Assistant Attorney General.

Exhibit "A"



GRIFFIN'S

Where good furniture costs less

ARLINGTON, VERMONT 05250
Telephone (802) 375-2800, 375-2310

The prices at GRIFFIN'S are so much lower than normal retail markup prices that we never have had a "sale" — and because of this low pricing policy of top quality furniture, we never will.

You are cordially invited to visit us on any day of the week including Sundays, until 5:30 p.m.